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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SUSAN EZELL, et al., Plaintiffs, Cross-Defendants and Appellants, v. ALBERT CORBI, et al., Defendants, Cross-Complainants and Respondents.	B196128 (Los Angeles County Super. Ct. No. BC 301514)

APPEAL from a judgment of the Superior Court of Los Angeles County. Paul Gutman, Judge. Affirmed in part; reversed in part.

Hall & Lim, Timothy A. Hall and Ani Aghajani for Plaintiffs, Cross-Defendants and Appellants.

Frank G. Blundo, Jr. for Defendants, Cross-Complainants and Respondents.

Appellants Susan Ezell and Clay Ezell and respondents Albert Corbi and Lana Corbi are neighbors in the Hollywood Hills. Appellants sued respondents (and another person) relating to a prescriptive easement appellants had on respondents' property. Appellants contend the judgment, which found appellants should take nothing by their complaint, should be reversed on two of the causes of action of the complaint. We reverse the judgment as to one cause of action and affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL SYNOPSIS

I. Operative Pleadings

On August 27, 2003, appellants filed a complaint asserting causes of action for: (1) physical damage property; (2) conversion/removal of trees, underwood, shrubs and landscaping; (3) interference with easement; (4) emotional distress; and (5) injunctive relief.[1] The complaint alleged respondents entered the easement, wrongfully cut down more than 100 trees, shrubs, landscaping, and/or fences on the easement, damaged water lines and deposited dirt and debris on the easement.

On August 27, 2004, respondents filed a second amended cross-complaint for: (1) termination of easement; (2) modification of easement; (3) injunctive relief; (4) trespass; (5) intentional infliction of emotional distress; and (6) negligent infliction of emotional distress.

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[1] Appellants subsequently filed a cross-complaint alleging the same causes of action against respondents and others with the exception of the period of time the alleged acts occurred.

II. Court Rulings

In 1989, a court judgment awarded appellants a prescriptive easement over property currently owned by respondents. The Court of Appeal affirmed the judgment. In pertinent part, the judgment provided appellants were given:

> the continual, present and future use, repair, maintenance and control of all of the significant items within the legally described fenced area mentioned above, including, but not limited to, the pool, pool equipment, pool house shed, concrete and redwood decking, concrete retaining walls, wood and concrete steps, blacktop driveway, landscaped garden, trees and shrubs.

Respondents' predecessor-in-interest retained ownership of the underlying fee.

On November 30, 2004, the court signed its order granting respondents' motion for summary adjudication of the first cause of action of the complaint.

On June 1, 2005, the court granted respondents' motion for judgment on the pleadings on the third cause of action of the complaint.

The court granted the motions of respondents for judgment on the pleadings as to the other causes of action of the complaint and the Ezell cross-complaint. The court or jury found in favor of appellants on the first four causes of action of respondents' cross-complaint. On November 9, 2006, after a jury verdict finding Clay was liable on the fifth cause of action of respondents' cross-complaint for emotional distress for $250,000 each to Albert and Lana, the court entered a final judgment.

Appellants filed a timely notice of appeal from the judgment.

DISCUSSION

We independently review the trial court's rulings on either a motion for summary adjudication or a motion for judgment on the pleadings. (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972 [summary adjudication]; *Ludgate Ins. Co. v. Lockheed Martin Corp*. (2000) 82 Cal.App.4th 592, 602 [judgment on the pleadings].)

I. Property Damage

Appellants contend the court improperly granted summary adjudication of the first cause of action of their complaint for physical damage because they owned the trees pursuant to the 1989 judgment. That cause of action alleged respondents entered onto the easement and "wrongfully cut down trees, underwood, shrubs, landscaping and/or fences" and damaged water lines and deposited dirt and debris on the easement. Appellants sought damages pursuant to Civil Code section[2] 3346 and Code of Civil Procedure section 733.

In pertinent part, section 3346 provides: "For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment, except that where the trespass was casual or involuntary, or . . . the measure of damages shall be twice the sum as would compensate for the actual detriment, . . ." (Emphasis added.)

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[2] Unless otherwise noted, all statutory references are to the Civil Code.

In pertinent part, Code of Civil Procedure section 733 provides: "Any person who cuts down or carries off any wood or underwood, tree, or timber, or girdles or otherwise injures any tree or timber on the land of another person, . . . is liable to the owner of such land, . . . for treble the amount of damages . . . ." (Emphasis added.)

In granting summary adjudication on the first cause of action, the court stated:

> [T]he language of [section 3346] and [Code of Civil Procedure section 733] must be strictly construed and literally interpreted as the double and treble damages awarded thereunder are punitive in nature. The two statutes allow for double or treble damages for the wrongful cutting of trees on "the land of another." It is undisputed that the trees which defendants are alleged to have cut are located on land that is owned by the defendants. It is undisputed that the plaintiffs do not own this land. The trees and vegetation are affixed to the land and are part of the real property owned by defendants. As the defendants have allegedly cut trees on their own land and not on the "land of another[,"] plaintiffs cannot as a matter of law recover under [section 3346] and [Code of Civil Procedure section 733].

Appellants state that both they and respondents have a property right to the trees at issue and reason that since they own the trees, they had a right to a trial on the issue of damages resulting from respondents' cutting of the trees. Appellants note that in *City of Los Angeles v. Hughes* (1927) 202 Cal. 731, 736-737 disapproved on another point in *County of Los Angeles v. Faus* (1957) 48 Cal.2d 672, 680, the court determined that a tenant, not the landlord, of land leased to a nursery was entitled to be compensated for trees growing on the land in an eminent domain action. However, the court cited section

1013[3] and noted there was an agreement between the parties the trees should not become the property of the owner of the land. (*Ibid*.)

In this case, no agreement was needed in light of the earlier judgment establishing the easement. Appellants were granted rights with respect to the maintenance and control of the trees, giving them a protected interest in the landscaping at issue. As in the cases cited by appellants, such a separate interest can be recognized and legally assured.

Appellants cite other cases recognizing that trees can be owned separate from the soil. (See e.g., *Daubenspeck v. Grear* (1861) 18 Cal. 443, 446-447 [a person who planted trees and shrubs on land owned by the state pursuant to a state act was entitled to a permanent injunction to prevent a mining operation from destroying the trees and shrubs]; *Stewart v. Sefton* (1895) 108 Cal. 197 [the plaintiff, an owner of land, was not entitled to damages from the defendant who planted trees on the plaintiff's land and then dug them up and moved them to his (defendant's) own property after discovering the trees were not on his land]; *Sears v. Ackerman* (1903) 138 Cal. 583, 586-587 [grantor properly retained ownership of timber pursuant to an exception in a deed conveying to another the land on which the trees grew]; *Red River Lumber Co. v. Null* (1924) 66 Cal.App. 499, 505-506 [a lumber company acquired title to timber by adverse possession but not title to the land on which the trees grew].)

However, while the trial court was in error in failing to separate the interest in the landscaping from the fee title to the underlying land, it did not err in concluding that appellants could not recover under the provisions on which they relied. The statutes' plain language, in permitting double and triple damages, requires that the prohibited cutting have been done on the land of another. Respondents entered land to which they have fee title, making the statutes inapplicable to their actions. Thus, the court properly granted summary adjudication on the first cause of action.

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[3] Section 1013 provides: "When a person affixes his property to land of another, without an agreement permitting him to remove it, the thing affixed, except as otherwise provided in this chapter, belongs to the owner of the land, unless . . . ."

II. Interference with Easement

Appellants contend the court improperly granted judgment on the pleadings as to the third cause of action of their complaint for interference with easement as the court mistakenly ruled the case involved the denial of access to property. The third cause of action alleged that respondents interfered with appellants' easement rights by cutting "down trees, underwood, shrubs and landscaping contrary to the 1989 Judgment." The 1989 judgment granted appellants an easement for "the continual, present and future use, repair, maintenance and control of . . . landscaped garden, trees and shrubs."

An easement is an interest in the land of another that gives the easement holder the right to use the land of the other person and/or restricts the use by the fee owner of her own land. (See § 887.010; *Moylan v. Dykes* (1986) 181 Cal.App.3d 561, 568.) "[T]he easement holder must exercise his or her right so as not to impose an unnecessary burden on the servient tenement, and the owner of the servient tenement may make any use of the property that does not unduly interfere with the easement." (12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 412, pp. 483-484.)

"[A]n appurtenant easement is a burden on land that creates a right-of-way or the right to use the land only. [§ 801.] It represents a limited privilege to use the land of another for the benefit of the easement holder's land, but does not create an interest in the land itself. [¶] An easement is therefore an incorporeal or intangible property right that does not relate to physical objects but is instead imposed on the servient land to benefit the dominant tenement land. Being incorporeal, the right to an easement is limited to the intangible benefit of access to the easement holder's property. In other words, it is an intangible legal right. The owner of the dominant tenement may maintain an action for the enforcement of this intangible right and may recover damages from a party for obstructing the easement. Awardable damages compensate the plaintiff for loss of use of the easement and the diminished value of the lot it benefited." (*Kazi v. State Farm Fire & Casualty Co.* (2001) 24 Cal.4th 871, 880-881.)

"Because an easement interest conveys no property rights to the land subject to the easement, it exists only to benefit the easement holder's property. Interference with an easement frustrates the right of access by the easement holder to the burdened property, regardless of the method used to obstruct it, i.e., whether the easement is cordoned off or is physically damaged. In either case, the remedy is the same: the plaintiff must request that the obstruction be removed. The damages are also the same in either case: the dominant estate's loss of rental value and diminished property value, or loss of the easement's fair market value. In neither case, however, may an easement holder sue for damages to the underlying property, which the owner of the servient estate holds in fee title." (Citation omitted.) (*Kazi v. State Farm Fire & Casualty C*o., *supra*, 24 Cal.4th at p. 884.)

"The owner of an easement has valuable property rights that are protected by the law. The owner of the easement can enjoin any interference with the easement as a nuisance, recover damages caused by a wrongful loss of use, and receive compensation if the easement is taken by eminent domain." (Fns. omitted.) (6 Miller & Starr, Cal. Real Estate (3d ed. 2000) Easements, § 15.5, p. 15-21.) "The owner of the easement whose rights have been impeded can recover damages, which are measured in the same manner as those for any other nuisance. The easement owner, for example, can recover damages for diminution in the value of the dominant tenement and for annoyance and discomfort flowing from loss of use. Other compensatory damages may be available when proximately caused by the nuisance, and if malice can be shown, exemplary damages can be recovered." (Fns. omitted.) (*Id*., at § 15.72, p. 15-238.)

"When a person interferes with the use of an easement he deprives the easement's owner of a valuable property right and the owner is entitled to compensatory damages. The interference is a private nuisance and the party whose rights have been impeded can recover damages as measured in the case of a private nuisance. Damages may be recovered for diminution of the property's value and for annoyance and discomfort flowing from loss of use." (Citations omitted.) (*Moylan v. Dykes*, *supra*, 181 Cal.App.3d at p. 574.)

"An obstruction or disturbance of an easement is anything which wrongfully interferes with the privilege to which the owner of the easement is entitled by making its use less convenient and beneficial than before. An obstruction need not emanate from within the boundary of the easement. To constitute an actionable wrong, the obstruction must be of a material character such as will interfere with the reasonable enjoyment of the easement. If an improvement does not interfere with the current uses of the easement, the reasonableness of the interference with servitude depends on the character of the improvement and the likelihood that it will make future development of the easement difficult. . . . [¶] Whether conduct constitutes substantial interference with an easement depends on the parties' intentions at the time the easement was created." (Fns. omitted.) (28A C.J.S. (2008) Easements, § 234, pp. 454-455.)

In granting the motion for judgment on the pleadings, citing *Kazi*, the court ruled: "Plaintiffs do not allege that they were prevented from using their easement; rather, they allege cutting of the trees, shrubbery, etc. An easement holder may not sue for damages to the underlying property which the owner of the servient estate holds in fee title." The court also noted it had already ruled that respondents owned the tree, shrubs, etc. and that the trees and vegetation were affixed to the land and "thereby a part of the real property."[4]

That ruling ignores the effect of the 1989 judgment. Although the 1989 judgment did not award appellants ownership of the trees or the exclusive use of the easement, it did give them a broad easement in the fenced-in area by giving them the right to maintain, repair and control the trees, shrubs, etc. Subsequent to granting the judgment on the pleadings, in ruling on respondents' cross-complaint, the court recognized the easement "necessarily includes the right to plant trees, shrubs and gardens if the holder of

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[4] Pursuant to section 658, real property includes "[t]hat which is affixed to land." Section 660 defines fixtures as: "A thing is deemed to be affixed to land when it is attached to it by its roots, as in the case of trees, vines, or shrubs; . . ."

the servient tenement destroys them. Otherwise, the servient tenement holder would have the unilateral right to terminate the easement."

Appellants alleged respondents entered the easement several times and cut more than 100 trees, underwood, shrubs and landscaping. At the very least, it appears there are questions of fact as to whether respondents' cutting the trees, etc. interfered with appellants' easement. It is conceivable that the cutting might have caused a diminution in the value of appellants' property or damages for annoyance and discomfort flowing from loss of use. Whether cutting the trees substantially interfered with the easement or appellants' reasonable enjoyment of the easement or respondents could justify their cutting of the trees or had an affirmative defense to cutting the trees cannot be determined by the pleadings. Even though appellants could have done a better job of pleading their damages as they did not allege wrongful loss of use of the easement or diminution of property value, the pleading was sufficient to state a cause of action.

Accordingly, we reverse the order granting judgment on the pleadings on the third cause of action and order the court to enter an order denying the motion and to proceed on that cause of action.

DISPOSITION

The judgment is reversed as to the third cause of action; in all other respects, the judgment is affirmed. The superior court is directed to vacate its order granting judgment on the pleadings on the third cause of action and enter an order denying judgment on the pleadings on that cause of action. Appellants to recover costs on appeal.

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WOODS, Acting P.J.

We concur:

ZELON, J. **JACKSON, J.**